No. 90-1558

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In The

Supreme Court of the United States

October Term, 1990

DEVAUGHN E. WILLIAMS,

Petitioner,

v.

FIRST UNION NATIONAL BANK
OF NORTH CAROLINA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF PARTIES

The parties to the proceeding below were Petitioner, DeVaughn E. Williams, and Respondent, First Union National Bank of North Carolina.

The parent company of Respondent is First Union Corporation. All affiliates and subsidiaries of Respondent are wholly owned by First Union Corporation.

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STATEMENT OF THE CASE

The Petitioner, DeVaughn E. Williams ("Williams"), initiated this action in the District Court for the Eastern District of North Carolina. In the complaint, Williams alleged he was subjected to discriminatory working conditions during his employment with the Respondent, First Union National Bank of North Carolina ("First Union"), and eventually was constructively discharged because of his race and in retaliation for his having filed charges of discrimination against First Union with the Equal Employment Opportunity Commission ("EEOC").

In response to First Union's motion to dismiss for failure to state a claim upon which relief can be granted, Williams filed an amended complaint. In the amended complaint, which was brought solely pursuant to 42 U.S.C. § 1981, Williams alleged First Union violated § 1981 by refusing to enter into a nondiscriminatory employment relationship with him because of his race, by subjecting him to discriminatory conditions of employment because of his race and in retaliation for filing charges of discrimination with the EEOC, and by constructively discharging him because of his race and in retaliation for filing charges of discrimination.

First Union again moved to dismiss for failure to state a claim upon which relief can be granted. The motion was referred to a Magistrate who recommended the amended complaint be dismissed. More specifically, the Magistrate found that Williams' discriminatory hiring claim was time barred and that, after *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), Williams' allegations of discriminatory working conditions and of constructive

discharge based on racial discrimination and retaliation failed to state a claim under § 1981. The district court adopted the Magistrate's recommendation, dismissed the amended complaint, and entered judgment in favor of First Union.

Williams appealed the judgment to the Court of Appeals for the Fourth Circuit. On appeal, Williams raised three issues: (1) whether a claim of discriminatory discharge implicates the "make and enforce contracts" provision of § 1981; (2) whether Williams' claim that he was subjected to discriminatory working conditions in retaliation for filing EEOC charges is actionable under § 1981; and (3) whether *Patterson v. McLean Credit Union* should have been applied retroactively to this case. On December 6, 1990, the court of appeals affirmed, finding the district court properly granted First Union's motion to dismiss for failure to state a claim upon which relief can be granted. The court denied a petition for rehearing on January 8, 1991.

REASONS FOR DENYING THE WRIT

I. NO CONFLICT EXISTS AMONG THE COURTS OF APPEALS AS TO WHETHER A CLAIM OF RACIAL OR RETALIATORY DISCHARGE IS ACTIONABLE UNDER § 1981.

Williams contends this Court should grant his petition for writ of certiorari because the courts of appeals are in conflict over the scope of § 1981 after this Court's decision in *Patterson v. McLean Credit Union*. He is wrong.

The only court of appeals decision to hold squarely that discharge and retaliation claims remain actionable under § 1981 after *Patterson* has been vacated by this Court. *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), *vacated and remanded*, 59 U.S.L.W. 3635 (March 18, 1991). Every other court of appeals that has directly ruled on this issue has agreed with the Fourth Circuit that these claims are not actionable under § 1981. The Second, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have held racial discharge claims are not governed by § 1981. *Trujillo v. Grand Junction Regional Center*, 928 F.2d 973 (10th Cir. 1991); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255 (6th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3687 (March 26, 1991); *Thompkins v. DeKalb County Hosp. Auth.*, 916 F.2d 600 (11th Cir. 1990); *Gonzalez v. Home Ins. Co.*, 909 F.2d 716 (2d Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3635 (March 18, 1991); *Walker v. South Cent. Bell Tel. Co.*, 904 F.2d 175 (5th Cir. 1990); *Courtney v. Canyon Television & Appliance Rental*, 899 F.2d 845 (9th Cir. 1990). The Fifth, Seventh, Ninth, and Eleventh Circuits are in agreement with the Fourth Circuit that retaliatory discharge claims are not actionable under § 1981. *Thompkins v. DeKalb County Hosp. Auth.; McKnight v. General Motors Corp.; Overby v. Chevron U.S.A., Inc.*, 884 F.2d 470 (9th Cir. 1989); *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989).

Since the Eighth Circuit's decision in *Hicks v. Brown Group, Inc.* has been vacated, no conflict exists among the courts of appeals over the scope of § 1981. A substantial number of the courts of appeals have directly considered whether racial and retaliatory discharge claims are actionable under § 1981, and all have held they are not.

Since the courts of appeals are not in conflict, there is no legitimate reason to grant a writ of certiorari in this case.

II. THE COURTS OF APPEALS ARE CORRECTLY HOLDING THAT CLAIMS OF RACIAL AND RETALIATORY DISCHARGE ARE NOT ACTIONABLE UNDER § 1981.

Williams contends the courts of appeals are misapplying this Court's decision in *Patterson v. McLean Credit Union* to hold claims of racial and retaliatory discharge are not actionable under § 1981. A review of the *Patterson* decision, however, reveals the courts of appeals are properly holding that allegations of racial and retaliatory discharge do not state claims under § 1981. In *Patterson*, this Court observed that:

> The most obvious feature of [§ 1981] is the restriction of its scope to forbidding discrimination in the "mak[ing] and enforce[ment]" of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief. Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts.

491 U.S. at 175. The Court then turned to an examination of these two specific rights.

The right to make contracts, the Court noted, "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment." *Id.* The right to enforce contracts "embraces protection of a legal process, and of a

right of access to legal process, that will address and resolve contract-law claims without regard to race." 491 U.S. at 177.

The Court cautioned against reading the statutory terms "make" and "enforce" beyond their plain and common sense meaning, stating that, "our task here is not to construe § 1981 to punish all acts of discrimination, but rather merely to give a fair reading to the scope of the statutory terms used by Congress." 491 U.S. at 185 n.6. Accordingly, "[w]here an alleged act of discrimination does not involve the impairment of one of these rights, § 1981 provides no relief." 491 U.S. at 175.

Williams maintains that the termination of his employment violated the right to make contracts provision of § 1981. As noted above, however, *Patterson* expressly held this statutory protection governs conduct only at the initial formation of the contract; it "does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract. . . . " 491 U.S. at 177. Clearly, termination of the employment relationship is not conduct at the initial formation of the contract, but involves instead acts "after the contract relation has been established, [to wit] breach. . . . " Consequently, the courts of appeals properly are holding that discharge is not actionable under the right to make contracts provision of § 1981.

Williams also argues that his claims of retaliation are actionable under § 1981 because the retaliation was in response to his efforts to enforce his contract rights by

filing EEOC charges. It is manifest from *Patterson* that this is too broad a reading of the § 1981 protection.

In discussing the reach of the statute's right to enforce contracts provision, this Court held:

> It also covers wholly *private* efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations. . . . The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights.

491 U.S. at 177.

As an example of private conduct that violates this protection, the Court cited its decision in *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). In *Goodman*, the plaintiffs' labor union refused to process grievances in which employees claimed they were victims of racial discrimination. The *Patterson* Court noted the *Goodman* plaintiffs had stated a claim under the right to enforce contracts portion of § 1981 because unions "bear explicit responsibilities to process grievances, press claims, and represent member [sic] in disputes. . . . " 491 U.S. at 177. Because the union in *Goodman* did not fulfill its explicit responsibility to process the grievance, the employees were completely barred from access to a legal process and were impaired from enforcing their established contract rights under the collective bargaining agreement. Accordingly, the union violated § 1981 by interfering with the employees' right to enforce contracts.

There is an obvious difference between the conduct in *Goodman*, which was found to be actionable, and that

complained of here. In *Goodman*, the union discriminatorily refused to perform a function that was necessary and essential for the plaintiffs to access the legal process. By not processing the grievances, the union totally precluded the plaintiffs from enforcing their contract rights. In contrast, the alleged retaliatory actions and retaliatory discharge in the instant case clearly did not impair Williams from filing or pursuing his EEOC charges. Although Williams argues the alleged retaliation impacted his financial ability to pursue his claim, the conduct of which he complains simply did not directly impede or obstruct his access to legal process. Thus, the conduct is not actionable under § 1981.

The courts of appeals are correctly holding that claims of retaliatory discharge do not implicate the right to enforce contracts provision of § 1981 and are not actionable under that statute.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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